# Tan Tok Nam & Anor v Pan Global Insurance Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–113 OF 1998
KAMALANATHAN RATNAM J
21 AUGUST 2002

***Insurance*** *— Motor insurance — Liability of insurer to satisfy judgment obtained against insured — Sale of car by insured to purchaser — Motor vehicle insured by insured's insurer and purchaser's insurer at the time of the accident — Insured failed to inform his insurer of the sale of the car — Recovery action against insurer — Which of the insurers was liable to satisfy judgment — Road Transport Ordinance 1958 s 80*

***Road Traffic*** *— Insurance — Double insurance — Which of the insurers was liable to satisfy judgment — Sale of car by insured to purchaser — Motor vehicle insured by insured's insurer and purchaser's insurer at the time of the accident — Insured failed to inform his insurer of the sale of the car — Road Transport Ordinance 1958 s 80*

This was the plaintiffs' appeal against the decision of the sessions court judge in dismissing their recovery action against the insurers ('PGI'). In the initial action, the first and second plaintiffs, as the driver and owner respectively of motor lorry PQ 2931, sued one Lim Ah Chim ('Lim') as the owner of motorcar PM 9379 ('the said car') in respect of a road accident on 26 July 1983. The first plaintiff sustained personal injuries and claimed damages for pain and suffering and for special damages. The second plaintiff's claim was in respect of special damages being the cost of the motorlorry, which was beyond repairs and for loss of earnings. In his defence, Lim admitted that he was the registered owner of the said car at all material times but denied that the driver of the said car was negligent. At the end of the trial, the sessions court judge ordered Lim to pay damages to the plaintiffs. Having obtained judgment against Lim, the plaintiffs sought recovery against PGI, the insurers of the said car and by way of a civil action commenced at the Butterworth sessions court, the plaintiffs sued PGI to recover the judgment sum with interest and costs. A search made by the plaintiffs with the Registrar & Inspector of Motor Vehicles, Pulau Pinang ('RIMV') showed that PGI were the insurers of the said car from 1 June 1983 to 31 May 1984 and that the insured was Lim. However the policy of insurance in respect of the same vehicle in the appeal record showed that it was insured with United Oriental Assurance Sdn Bhd ('UOA') as from 26 July 1983 to 25 January 1984 and that the insured was one Tan Chai Kim ('TCK'). In its defence to the recovery claim, PGI admitted issuing a policy to cover the said car from 1 June 1983 to 31 May 1984 but denied that they were the insurers of the said car at the material time because they contended that at the time of the accident, the ownership of the said car had passed on to TCK and that the insurers at the material time were UOA. PGI also denied liability towards the second plaintiff, as the claim was one for which they were not statutorily liable. TCK testified that he drove the said car at the time of the accident and that he had bought the car a few days before the accident

(although he had not made full payment). TCK admitted that on the day of the accident he did not know if the car was registered in his name or whether it was covered by insurance. When TCK was shown the cover note he admitted that Lim and not he was the registered owner of the said car at the material time. The sessions court judge held that there was a sale of the said car to TCK prior to the date of the accident and that there was no evidence from TCK that he had driven the motorcar as the plaintiffs' servant or agent for any vicarious liability to accrue and accordingly dismissed the plaintiffs' claim with costs.

**Held**, allowing the first plaintiff's appeal but dismissing the second plaintiff's appeal:

(1) Since the accident occurred on 26 July 1983, the Road Transport Ordinance 1958 ('the Ordinance') applied. In the instant case, RIMV had not been notified of the transfer and PGI were on record as the insurers covering the said car. If Lim had breached the policy condition by not notifying PGI of the sale of the said car to TCK, the same was a matter between PGI and Lim and it was always open to PGI to sue Lim for indemnity for breach of policy condition or for failing to comply with s 86 of the Ordinance. But in so far as the first plaintiff was concerned, he was an innocent third party and s 80 of the Ordinance clearly stated that '... notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability...' (see pp 749E–F, 750D–G).

(2) Whilst the said car had UOA as insurers, it was also covered by PGI. PGI did not lead any evidence to show that it had repudiated the policy or had cancelled the policy. In the absence of any evidence from PGI, and notwithstanding that Lim had not informed them of the sale of the said car, PGI were still the insurers because they had not gone on record to cancel the policy or cover note (see p 752A–B).

(3) Accordingly, PGI was liable to satisfy the judgment obtained by the first plaintiff. As the second plaintiff's claim was purely damage to property, the recovery proceedings against PGI could not be founded on any provision of the Ordinance and PGI was not statutorily liable to the second plaintiff. The second plaintiff's recourse was to proceed against the insured instead of the insurers (see p 752C–D).

**[Bahasa Malaysia summary**

Ini merupakan satu rayuan oleh plaintif-plaintif terhadap keputusan hakim mahkamah sesyen menolak tindakan pemerolehan balik

terhadap pihak penginsurans ('PGI'). Dalam tindakan pertama, plaintif pertama dan kedua, sebagai pemandu dan pemilik masing-masing lori motor berdaftar PQ 2931, telah mendakwa seorang bernama Lim Ah Chim ('Lim') sebagai pemilik kereta berdaftar PM 9379 ('kereta tersebut') berkaitan satu kemalangan jalan raya pada 26 Julai 1983. Plaintif pertama telah mengalami kecederaan pada dirinya dan menuntut ganti rugi atas kesakitan dan penderitaan dan untuk ganti rugi khas. Tuntutan plaintif kedua adalah berhubung ganti rugi khas sebagai kos untuk lori motor, yang tidak dapat dibaiki dan untuk kehilangan pendapatan. Dalam pembelaannya, Lim mengakui bahawa beliau adalah pemilik berdaftar kereta tersebut pada semua masa material tetapi menafikan bahawa pemandu kereta tersebut bertindak cuai. Di penutup perbicaraan, hakim mahkamah sesyen memerintah Lim supaya membayar ganti rugi kepada plaintif-plaintif. Selepas memperolehi penghakiman terhadap Lim, plaintif-plaintif telah memulakan tindakan mendapat balik terhadap PGI, pihak penginsurans kereta tersebut dan melalui satu tindakan sivil yang dimulakan di mahkamah sesyen Butterworth, plaintif-plaintif mendakwa PGI untuk mendapat balik jumlah penghakiman dengan faedah dan kos. Carian yang dijalankan oleh plaintif-plaintif di Jabatan Pendaftar dan Inspektor Kenderaan Motor, Pulau Pinang ('PIKM') menunjukkan bahawa PGI adalah pihak penginsurans kereta tersebut dari 1 Jun 1983 hingga 31 Mei 1984 dan bahawa pihak yang diinsuranskan adalah Lim. Walau bagaimanapun, polisi insurans berhubung dengan kenderaan yang sama dalam rekod rayuan menunjukkan bahawa ia diinsuranskan dengan United Oriental Assurance Sdn Bhd ('UOA') mulai 26 Julai 1983 hingga 25 Januari 1984 dan bahawa pihak yang diinsuranskan adalah seorang bernama Tan Chai Kim ('TCK'). Dalam pembelaan terhadap tuntutan mendapat balik, PGI mengakui telah mengeluarkan polis untuk melindungi kereta tersebut dari 1 Jun 1983 hingga 31 Mei 1984 tetapi menafikan bahawa mereka adalah pihak penginsurans kereta tersebut pada masa material kerana mereka berhujah bahawa pada masa kemalangan berlaku, milikan kereta tersebut telah beralih kepada TCK dan bahawa pihak penginsurans pada masa material adalah UOA. PGI juga enggan menanggung liabiliti terhadap plaintif kedua, oleh kerana tuntutan adalah untuk satu yang mana mereka tidak bertanggungjawab dari segi kanun. TCK memberi keterangan bahawa beliau telah memandu kereta tersebut pada masa kemalangan dan bahawa ia telah membeli kereta tersebut beberapa hari sebelum kemalangan itu (walaupun bayaran penuh belum dibuat). TCK mengakui bahawa pada hari kemalangan, ia tidak tahu sama ada kereta tersebut didaftarkan atas namanya sendiri atau sama ada ia dilindungi oleh insurans. Apabila TCK ditunjukkan nota lindungan, beliau mengakui bahawa Lim dan bukan dirinya adalah pemilik berdaftar kereta tersebut pada masa material. Hakim mahkamah sesyen memutuskan bahawa jualan kereta tersebut kepada TCK telah berlaku sebelum tarikh kemalangan dan bahawa tiada keterangan

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daripada TCK bahawa ia telah memandu kereta sebagai pekerja atau ejen plaintif-plaintif hinggakan menyebab terakrunya apa-apa liabiliti yang turut dirasakan dan dengan itu menolak tuntutan plaintif-plaintif dengan kos.

**Diputuskan,** membenarkan rayuan plaintif pertama tetapi menolak rayuan plaintif kedua:

(1) Oleh kerana kemalangan berlaku pada 26 Julai 1983, Ordinan Pengangkutan Jalan 1958 ('Ordinan tersebut') terpakai di sini. Dalam kes ini, PIKM tidak diberitahu tentang pindahmilik dan PGI dicatatkan sebagai pihak penginsurans kereta tersebut. Sekiranya Lim telah mungkir syarat polisi dengan tidak memaklumkan kepada PGI tentang jualan kereta tersebut kepada TCK, ia merupakan satu perkara yang sama antara PGI dan Lim dan ia sentiasa terbuka kepada PGI untuk mendakwa Lim atas tanggungan untuk kemungkiran syarat polisi atau untuk kegagalan mematuhi s 86 Ordinan tersebut. Tetapi setakat mana plaintif pertama berkaitan, ia adalah pihak ketiga yang tidak bersalah dan s 80 Ordinan tersebut jelas menyatakan bahawa '... notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability...' (lihat ms 749E–F, 750D–G).

(2) Sedangkan kereta tersebut mempunyai UOA sebagai pihak penginsurans, ia juga dilindungi oleh PGI. PGI tidak mengemuka sebarang keterangan untuk menunjukkan bahawa ia telah menolak polisi tersebut ataupun telah membatal polisi tersebut. Dalam ketiadaan apa-apa keterangan daripada PGI, dan tanpa mengira bahawa Lim telah tidak memberitahu mereka tentang jualan kereta tersebut, PGI masih merupakan pihak penginsurans kerana mereka tidak mencatatkan polisi atau nota lindungan telah dibatalkan (lihat ms 752A–B).

(3) Dengan itu, PGI bertanggungjawab memuaskan penghakiman yang diperolehi oleh plaintif pertama. Memandangkan tuntutan plaintif kedua cumalah ganti rugi atas kerosakan harta, prosiding mendapat kembali terhadap PGI tidak boleh berasaskan mana-mana peruntukan Ordinan tersebut dan PGI tidak bertanggungjawab secara berkanun terhadap plaintif kedua. Jalan keluar plaintif kedua adalah untuk meneruskan tindakan terhadap pihak yang diinsuranskan dan bukan pihak penginsurans (lihat ms 752C–D).]

**Notes**

For cases on double insurance, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 137.

For cases on liability of insurers to satisfy judgment obtained against insured, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) para 275.

**Cases referred to**

*QBE Insurance Ltd v Dr K Thuraisingam* [1982] 2 MLJ 62 (refd)

**Legislation referred to**

Road Transport Ordinance 1958 ss 74, 75, 80(1), (2)(a), (3), 86

*Brijnandan Singh Bhar* (*Brijnandan Singh Bhar & Co*) for the appellant.
*Rajendran* (*Dass Jainab & Assoc*) for the respondent.

**Kamalanathan Ratnam J**:

FACTS

*The initial action*

On 11 September 1984, one Tan Tok Nam and Tan Peng Hin t/a Chin Heng as the driver and owner (and as the first and second plaintiffs) respectively of motor lorry PQ 2931 sued one Lim Ah Chim ('Lim') as the owner of motorcar PM 9379 at all material times in the Penang High Court vide Civil Suit No 310/84. It was the case of the plaintiffs that on 26 July 1983, the first plaintiff was driving the said motorlorry along the Butterworth/Simpang Empat Road and in the direction of Butterworth when he was collided into by motorlorry AT 4012 which was forced to encroach into the first plaintiff's path by the negligence of Lim and/or his servant and/or his agent/or an authorized driver in the management and control of the said motorcar PM 9379 which came out without stopping from a side road on the plaintiff's right. Various particulars of negligence were pleaded. The first plaintiff sustained personal injuries and claimed damages for pain and suffering and for special damages. The second plaintiff's claim was only in respect of special damages being the cost of the lorry which was beyond repairs, amounting to RM35,000 and for loss of earnings at RM8,000 per month for five months amounting to RM40,000.

By his defence filed on 22 September 1984, Lim admitted that at all material times he was the registered owner of the said motorcar PM 9379. He went on to plead that it was not the negligence of the driver of the said motorcar PM 9379 which led to the collision but that the collision was caused solely and/or substantially contributed to by the negligence of the driver of motorlorry AT 4012 and the first plaintiff. He then went on to plead various particulars of negligence against both the drivers.

Parties filed an agreed statement of facts in which, inter alia, Lim admitted being the driver of the said motorcar PM 9379 at all material times. Lim's solicitors then proceeded to take out a summons for leave to issue a third party notice against the driver and owner respectively of motorlorry AT 4012 and obtained the said order on 9 October 1985. The

A third party then filed their defence. On 27 September 1988, the solicitors for Lim obtained an order discharging themselves as solicitors and a new firm of solicitors appeared for Lim as of 24 May 1990. In the meantime, the second plaintiff having died on 22 February 1978, his administrator substituted himself as the second plaintiff.

B The case having been transferred to the Sessions Court at Butterworth and upon hearing the evidence of the plaintiff and his witnesses and in the absence of Lim or the third party, the court on 4 November 1993 ordered Lim to pay the plaintiff the sum of RM12,000 as general damages with interest at 8%pa from the date of service of the writ and RM710 as special damages with interest at 4% from the date of accident to date of judgment.
C The defendant was also ordered to pay the second plaintiff the sum of RM25,000 as special damages with interest at 4% from the date of accident to the date of judgment. The total cost was assessed at RM4,785.

*Recovery action against the insurers*

D Having obtained judgment against the defendant Lim, the plaintiffs sought recovery against the insurers of the defendant's motorcar PM 9379 at the material time. By way of a civil action commenced at the Butterworth Sessions Court (52–240–94) the plaintiffs sued Pan Global Insurance Sdn Bhd ('Pan Global') to recover the full judgment sum with interest and costs. A search made by the plaintiffs upon the Registrar and Inspector of Motor
E Vehicles, Pulau Pinang ('RIMV') showed that Pan Global was the insurers of PM 9379 from 1 June 1983 to 31 May 1984 and that the insured was Lim and the cover note number was 514034. However, the policy of insurance in respect of the same vehicle in the appeal record showed that the said motorcar PM 9379 was insured with United Oriental Assurance Sdn Bhd ('UOA') as from 26 July 1983 to 25 January 1984 and that the
F insured was one Tan Chai Kim.

In its defence to the recovery claim, Pan Global, whilst admitting issuing a policy to cover the said vehicle from 1 June 1983 to 31 May 1984 denied that they were the insurers of the said vehicle at the material time because they contended that at the time of the accident the ownership of the
G said car had passed on to someone else and that the insurers at the material time were UOA. Pan Global also denied liability towards the second plaintiff as the claim was one for which they were not statutorily liable.

*The evidence led at trial*

H The plaintiffs called as their first witness the officer from the RIMV who testified that motorcar PM 9379 was insured with the defendants between the period 1 June 1983 to 31 May 1984. On the date of the accident, namely on 26 July 1983, pursuant to the records in his possession, the insurers were the defendant. Under cross-examination, the witness testified that in the case of a transfer of interest, the vendor of a motorcar would fill up and sign
I a form called MV3 whereas the purchaser would fill up a form called MV4 and sign it. The intended purchaser must then submit a fresh cover note or a policy of insurance from an insurer with the new purchaser's name

endorsed on the same cover note or policy. Together with these, the purchaser must also hand over a photostated copy of the identity card of both the purchaser and the vendor and finally the registration card of the said car must also be surrendered. It would normally take between three to four days for the new registration to take effect from the date the said documents were handed over to the RIMV.

The second witness was the first plaintiff. As soon as he was called, I note from the notes of evidence that counsel for the defendant consented to the contents of the pleadings and to the judgment. In a surprising turn of events, counsel for the defendant even conceded to the judgment obtained by the second plaintiff in respect of property damage. There was no cross-examination of this witness.

The defendants called as their first witness one Tan Chai Kim. He testified that it was he who drove the said car PM 9379 on 26 July 1983 when it was involved in a collision with the plaintiffs' motorlorry. He had bought the said car a day or two before the accident. He was not sure whether he had taken insurance when he bought the car. He didn't even know the name of the insurers of his vehicles at the material time.

Under cross-examination, he said that he left the matter of the registration of the car and the taking of insurance to a casual friend named Ah Leong. He admitted that on the day of the accident he did not know if the car was registered in his name or whether it was covered by insurance. All he knew was that he had bought the car. He also admitted that he had no record of a transfer of the vehicle to his name nor of any insurance covering him at the material time. He also had not seen the registration book of the said car. He also did not know if he had been registered as the owner of the said vehicle with the RIMV on the date of the accident. When shown the cover note, he admitted that Lim, and not he, was the registered owner of the said vehicle at the material time. In any case, Tan Chai Kim admitted that at the time of the accident, he had not made full payment for the vehicle.

The second witness for the defence was the Branch Manager of UOA. He testified that UOA had insured the said vehicle PM 9379 with effect from 26 July 1983 until 25 January 1984 with Tan Chai Kim as the policy holder. He confirmed that an own damage claim was made for the repairs of the said vehicle by Tan Chai Kim. At this stage, there was a half-hearted attempt by counsel for the defendant to tender the registration book of the said vehicle but upon the objection being taken, and even before the court could make a ruling, counsel withdrew his request to tender the registration book of the vehicle which he contended showed the registered owner as Tan Chai Kim. Under cross-examination, this witness testified that either the insured or the insurers could cancel the policy by giving due notice of cancellation within seven days, and that the RIMV must be notified of the cancellation by the insurer. He confirmed that if Pan Global was to cancel the policy, they must notify the RIMV of the said cancellation. When asked a specific question as to what the position would be if Pan Global did not notify the RIMV of the said cancellation, his evidence was that the said

A cancellation, if any, was ineffective and Pan Global would remain the insurers at the material time. The defence then called an adjuster who testified that he had attempted without success, to trace the whereabouts of Lim, the insured of the defendants at the material time. The defendants then closed their case without themselves giving evidence.

B Having heard lengthy submissions, the learned sessions judge dismissed the plaintiffs' claim with costs. In his judgment, the learned sessions judge held that there was a sale of the motorcar to Tan Chai Kim prior to the date of the accident. He further held that there was no evidence from the present owner Tan Chai Kim that he drove the car as the servant or agent of the previous owner for any vicarious liability to accrue.

C

*Findings of this court*

It is clear from the records of the RIMV that Pan Global was the insurers of the said motorcar on the date of the accident and that the insured then was Lim. There was some half-hearted challenges made upon the RIMV
D officer who testified that Pan Global was the insurers of PM 9379 as of 26 July 1983. It was put to him that the records may not be correct or that the details as contained in the cover note may not be true. But that submission did not take into consideration the defendant's admission in para 1 of the defence in this recovery action where the defendant admitted
E that the initial owner Lim had a valid insurance cover for the period of 1 June 1983 to 31 May 1984 with the defendants. However they denied they were at risk because at the material time there had been a transfer of interest.

Since the accident occurred on 26 July 1983, the pre-amendment Act would apply, namely the Road Transport Ordinance 1958 ('the
F Ordinance'). Section 74 of the Ordinance therefore made it mandatory for every registered owner of a motor vehicle to have a valid insurance cover in respect of third party risks. Section 75 of the Ordinance required insurers to provide cover in respect of the death of or bodily injury to any person arising out of the case of a motor vehicle on the road and the insurers are required
G to issue to the insured a certificate of insurance which includes a cover note. However, it is s 80 of the Ordinance that is most relevant to the issue before me. The relevant parts of the said section reads as follows:

> (1) If, after a certificate of insurance has been delivered under sub-s 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under
H para 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in
I respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
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> (2) No sum shall be payable by an insurer under subsection —

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings; A

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liablity, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein either — B

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating the certificate had been lost or destroyed; C

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or D

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

To my mind, s 80(1) of the Ordinance is explicit. The innocent third party was totally unaware of the alleged transfer of interest. The RIMV had not been notified of the new change. Pan Global was on record as covering the said vehicle. If the insured, namely the original owner Lim, had breached the policy condition by not notifying the insurers of the sale, then it is a matter between the insurers and the insured. It is always open to the insurers to sue their then insured for indemnity for breach of policy conditions or for failing to comply with s 86 which requires the insured to surrender the said certificate or give notice within seven days from the date of cancellation, which means from the date of the sale of his car to Tan Chai Kim. But in so far as the innocent third party is concerned, the said section is clear. Notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability'. These words are explicit. Subsection (3) of the said section provides that Pan Global need not pay the judgment sum if it had commenced before or within three months after the commencement of the proceedings in which the judgment was given, namely in Suit No 310–84, the said insurers had obtained a declaration that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular. In any case, whether the insurer can fall within the protection of this provision in this case where there was no material non-disclosure when the policy was obtained, and whether the said insurer could avail itself of this proviso when the only ground was that the insured had transferred the interest without cancelling the policy is a matter for the court to decide. For the moment, s 80 of the Ordinance requires Pan Global to satisfy the E F G H I

judgment sum. There is another issue I have to consider. Pursuant to s 80(2)(a) of the Ordinance, the third party must, before or within seven days after the commencement of the proceedings in which judgment was given, give notice of such commencement of proceedings to the insurers. I must presume such notice must have been given although I am surprised that counsel for the plaintiffs had omitted to include this vital notice in the appeal record. I must presume so because both counsel involved in this appeal specialize in running down cases and there is no doubt in my mind that the said notice would have been given. In any case, para 1 of the defence admits the cover but merely denies the risk, not on this issue that no notice under s 80(2)(a) of the Ordinance had been given, but because of the transfer.

Looking into the facts of the case, it is also clear that the learned sessions judge had erred in finding as a fact that the said car was sold prior to the accident. Tan Chai Kim himself is unable to state when he bought it. He did not even know when he became the registered owner of the car. He left it entirely to his friend Ah Leong, whom he described as a casual friend. Yet this Ah Leong was never called to testify. To my mind, Ah Leong is a vital witness who could have given evidence as to the date of purchase of the vehicle. I must however hold it against the defence for failing to call its own insured Lim as its witness. Only his evidence will suffice to show if Tan Chai Kim was or was not his servant or agent at the material time. While Tan Chai Kim said that he had purchased the vehicle two or three days before the accident, the certificate of insurance from UOA included in the record of appeal showed that the said car was covered by UOA from 26 July 1983 to 15 January 1984 and the accident occurred on 26 July 1983. So in other words, for those two to three days was Tan Chai Kim driving the said car with the consent of Lim? And if this was so, certainly Tan Chai Kim would have been covered by Pan Global. It is common ground that one need not be the servant or agent of the owner of the vehicle to be covered by insurance, so long as one drives the said car with the consent of the insured. Then there is the admission of Lim in the statement of agreed facts that he was driving the said car at the material time, whereas in this present recovery claim Tan Chai Kim had stated that he was the driver. This material discrepancy has not been explained by the defence. Whilst in this case, Tan Chai Kim denied knowing Lim, to my mind the material witness to have been called would be the insured of the defendant. Of course the defendants adduced evidence through their adjuster that he had tried to contact Lim. The adjustor's pathetic attempt to trace the witness is unacceptable. He merely met a postman who told that there was no such address as given, of Lim. However, he went to that area where the house was located and asked one or two residents. It would have been a simple exercise to have officially written to the National Registration Department giving details of Lim's identity card number with the usual search fee to have obtained a prompt response. I am not convinced that a proper attempt had been made to trace Lim.

Another pertinent failure of the defence is its refusal to testify upon its own cause. Surely Pan Global could have sent its claims manager or a

representative to testify that it had repudiated or cancelled the policy. For all intents and purposes whilst the said car had UOA as insurers, it was also covered by Pan Global. Even todate, Pan Global had led no evidence that it had repudiated the policy or had cancelled the policy. I find that in the absence of any evidence from the defendant, and notwithstanding their insured's conduct in not informing them of the sale of the said motorcar, Pan Global were still the insurers because they had not gone on record to have cancelled the policy or cover note.

It is clear that the said vehicle was covered by double insurance at the material time. It is for Pan Global to satisfy the plaintiffs and then to recover if at all or share the loss with the co-insurers. That is for both the insurers to decide.

I therefore hold that Pan Global is liable to satisfy the judgment obtained by the first plaintiff. As the second plaintiff's claim is purely damage to property, the recovery proceedings against Pan Global cannot be founded on any provision of the Road Traffic Ordinance and therefore Pan Global is not statutorily liable to the second plaintiff unlike the case of the first plaintiff (see *QBE Insurance Ltd v Dr K Thuraisingam* [1982] 2 MLJ 62). The second plaintiff's recourse is to proceed against the insured, not against the insurers.

I therefore allow the first plaintiff's appeal with costs and dismiss the second plaintiff's appeal, also with costs.

*First plaintiff's appeal allowed and second plaintiff's appeal dismissed.*

Reported by Lim Lee Na